IN THE SUPREME COURT OF THE STATE OF DELAWARE

WYATT WALDROP,[1]	§	No. 243, 2022
	§	
Respondent Below,	§	Court Below—Family Court
Appellant,	§	of the State of Delaware
	§	
v.	§	File No. 20-05-06TN
	§	
DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES/DIVISION OF FAMILY SERVICES,	§	Petition No. 20-10758
	§	
	§	
	§	
	§	
Petitioner Below,	§	
Appellee.	§	

Submitted: February 6, 2023
Decided: March 10, 2023

Before **SEITZ**, Chief Justice; **VALIHURA** and **VAUGHN**, Justices.

ORDER

After consideration of the brief and motion to withdraw filed by the appellant's counsel under Supreme Court Rule 26.1(c), the responses, and the Family Court record, it appears to the Court that:

(1) The appellant ("Father") filed this appeal from the Family Court's order dated June 13, 2022, terminating his parental rights in his child born in April 2018

[1] The Court previously assigned pseudonyms to the parties and the child under Supreme Court Rule 7(d).

(the "Child").[2] Father's counsel has filed an opening brief and a motion to withdraw under Supreme Court Rule 26.1. Father's counsel states that he is unable to present a meritorious argument in support of the appeal. Counsel informed Father of the provisions of Rule 26.1(c), provided him with a copy of counsel's motion to withdraw and the accompanying brief, and advised him that he could provide counsel with any points that he wanted the Court to consider. Although Father did not provide any points to counsel, he submitted to the Court certain arguments in the form of a "Motion for Remand for Appointment of Counsel." The Court addresses those arguments below. The Delaware Division of Family Services and the Child's attorney argue that the Family Court's judgment should be affirmed. For the following reasons, we affirm the judgment.

(2) The record reflects that in February 2019, when the Child was approximately ten months old, DFS received a report that Father and Mother were using drugs in a car with the Child present. The Child was placed with her maternal grandparents, and DFS referred Mother for treatment. Also in February 2019, Father was charged with various criminal offenses, including second-degree robbery, motor-vehicle theft, harassment, and others. He was taken into custody and has

[2] The Family Court also terminated the parental rights of the Child's mother ("Mother"). Because this appeal concerns only the termination of Father's parental rights, we focus on the facts and procedural history as they relate to Father.

remained incarcerated since that time; he also incurred additional criminal charges arising from his alleged conduct while incarcerated.

(3) On February 14, 2019, Mother filed a petition for an order of protection from abuse ("PFA") against Father. A Family Court Commissioner issued a lifetime PFA order against Father and in favor of Mother and the Child, after finding, among other things, that Father "intentionally or recklessly caused or attempt[ed] to cause physical injury or sexual offense" to Mother. The PFA order prohibited Father from having any contact with Mother or the Child and from being within 100 yards of Mother, the Child, or the Child's daycare. Father sought review of the Commissioner's order, and the Family Court affirmed after finding that there was a history of domestic violence by Father against Mother; Father committed acts of abuse against Mother, including grabbing her by the neck and pinning her to a bed, which interfered with her breathing; and Father prevented Mother from calling 911 for help.

(4) In July 2019, the maternal grandparents notified DFS that they could no longer care for the Child. The Family Court awarded emergency *ex parte* custody to DFS. DFS then filed a petition for custody of the Child, alleging that the Child was dependent, neglected, and abused in Mother's and Father's care. Specifically, DFS alleged that Mother had no housing and was actively abusing drugs and that Father was incarcerated. The petition also alleged that Father had written a

threatening letter to a DFS worker in April 2019, resulting in the filing of police report. The Child was placed in a foster home, where she continued to live throughout the proceedings.

(5) At a preliminary protective hearing on July 17, 2019, Father refused the appointment of counsel and stipulated to dependency based on his incarceration. By this time, Father was subject to multiple no-contact orders, including an order requiring that he have no contact with DFS because of his April 2019 letter.

(6) Father did not attend an adjudicatory hearing on August 26, 2019. DFS reported that Father was in a secured unit at Sussex Correctional Facility because of misconduct. A DFS worker testified that a no-contact order was in place between Father and another DFS worker and that Father had continued to write letters to the other DFS worker, despite the no-contact order. The Family Court found that the Child was dependent as to Father because of his incarceration and appointed counsel to represent Father.

(7) Father appeared for a dispositional hearing on September 24, 2019. He was still incarcerated pending trial. DFS submitted into evidence a case plan that it had prepared for Father. Father testified that he had received a copy of the case plan and had reviewed it with his case worker and signed it. The elements of the case plan included, among others, completing mental-health and substance-abuse evaluations and complying with recommended treatment; refraining from criminal

conduct, threatening behavior, and domestic violence; resolving his criminal charges; complying with no-contact orders; completing parenting and domestic-violence-prevention courses; and procuring stable housing. Father testified that he had completed a parenting class through Child Inc. and asserted that he had undergone a mental-health evaluation and had received mental-health treatment in prison. He also testified that he had completed the "6 for 1" program, which he stated included a domestic-violence component.

(8) Father appeared for a review hearing on December 16, 2019. He remained incarcerated pending trial. Father stated that he received mental-health treatment while in prison and that he planned to continue mental-health treatment after his release. Father received pictures of the Child from DFS but had not had any visits with her. The Family Court found that the Child remained dependent. The court found that Father had not made satisfactory progress toward completing his case plan, but the permanency plan continued to be reunification.

(9) In February 2020, a DFS worker received a threatening letter from Father; she filed a criminal complaint and notified the prison. Because of Father's repeated threats directed to DFS, all communication between DFS and Father after that time occurred through counsel.

(10) On March 17, 2020, Father filed a *pro se* petition seeking visitation with the Child. On April 21, 2020, Father's counsel moved to withdraw, asserting among

other things that Father had no confidence that counsel's representation would benefit him. DFS did not oppose the motion to withdraw but requested that the court appoint new counsel because of Father's behavior and the need for counsel to facilitate communication. In May 2020, DFS filed a motion seeking to change the permanency plan from reunification to termination of parental rights ("TPR") and adoption and a petition for termination of parental rights.

(11) At a review hearing on June 25, 2020, the court granted counsel's motion to withdraw and ordered that new counsel would be appointed. DFS opposed visitation between the two-year-old Child and Father in prison. Because of uncertainty surrounding whether Mother had failed to engage with some services or whether the services were unavailable because of the COVID-19 pandemic, the court stayed DFS's motion to change the permanency plan.

(12) After the Family Court appointed new counsel for Father, Father moved for visitation with the Child. The court ordered that Father would be permitted to have virtual visits with the Child if the Department of Correction ("DOC") was able to accommodate such visits and amended the PFA order to permit such virtual visits. DFS later arranged to schedule a fifteen-minute virtual visit between Father and the Child on March 26, 2021, which DOC permitted as a one-time exception to its policies, because the visit would require Father to use equipment that was typically reserved for virtual court appearances by inmates. Father asserted that he could

instead use an application (the "Getting Out application") on a computer tablet that was used for inmates to conduct virtual visits with friends and family. The Family Court ordered DFS to obtain more information about whether the Getting Out application could be used in the future "if the virtual visit on the 26th goes well."

(13) Following a permanency hearing on October 19, 2020, the court approved a change in the permanency plan to concurrent planning for reunification and for TPR/adoption. The Child had been in DFS custody for approximately fifteen months, and Father remained incarcerated. Father testified that he received mental-health treatment and attended anger-management groups while incarcerated.

(14) Also on October 19, 2020, Father's second court-appointed counsel moved to withdraw, asserting that Father's conduct had rendered the attorney-client relationship unreasonably difficult and that Father did not want his representation. The court referred the motion to another Family Court judge in order to avoid any appearance of prejudice to Father's case. The other Family Court judge granted the motion after Father admitted on the record making extremely pejorative and offensive statements to his counsel. Shortly thereafter, the court appointed a third counsel to represent Father. This third counsel represented Father through the TPR hearing and filed this appeal on Father's behalf.

(15) On August 11, 2021, Father appeared for a post-permanency review hearing. He remained incarcerated. Father had been found guilty in Family Court

in June 2021 of offensive touching, harassment, endangering the welfare of a child, and malicious interference with emergency communications. Charges remained pending against Father in Superior Court. A DFS worker testified that Father had followed the rules and behaved appropriately during his virtual visit with the Child in March 2021, but that the Child had been fearful and did not enjoy the visit. The DFS worker further testified that DFS had tried, three times, to facilitate additional visits through the Getting Out application. She testified that Father missed the first visit because he was sanctioned in the correctional facility; he missed the second visit because he did not confirm the visit twenty-four hours in advance as required by DFS; and he was a no-show for the third visit. DFS then learned that if the visits occurred, Father would be in an area of the prison where the Child would be able to see other prisoners, which raised concerns relating to the Child's privacy and confidentiality. DFS therefore had decided not to arrange any further visits unless Father could be isolated from other prisoners. The court determined that Father had not complied with his case plan and scheduled a hearing on the TPR petition for November 30, 2021. The court later stayed the TPR hearing at DFS's request because Mother had made progress on her case plan and DFS wanted to allow more time for Mother to complete it.

(16) The Family Court held a trial on the TPR petition on February 7, 2022. Father had been in DOC custody since February 2019. A correctional counselor

who worked at James T. Vaughn Correctional Center ("JTVCC") testified that Father had been involved in an assault on a correctional officer before his transfer to JTVCC on November 25, 2019, resulting in his placement in the maximum-security pretrial unit. Father had also accumulated numerous disciplinary reports while in custody in 2019, 2020, and 2021. Moreover, on May 22, 2019, Father was charged with three felony counts of breaching a no-contact order protecting Mother. The correctional counselor testified that Father's most recent disciplinary infraction had occurred on April 4, 2021, and his behavior had improved since then, resulting in his transfer out of the maximum-security pretrial unit to the general pretrial unit in November 2021. The correctional counselor testified that Father had regularly attended the mental-health sessions that were offered to him as a pretrial detainee, but that they did not include a domestic-violence-prevention component, and that all other programs were available only to sentenced inmates.

(17) A DFS worker testified that she observed the fifteen-minute virtual visit between Father and the Child in March 2021 and that Father behaved appropriately. She testified that the Child recognized Father's voice and appeared frightened and did not want to be in front of the camera. She further testified that after the visit, the Child reported that Father looked "scary." The DFS worker also testified that DFS had determined that virtual visits using the Getting Out application would be inappropriate because other inmates would be able to see the Child and that the

worker had regularly contacted DOC personnel to inquire about means to arrange virtual visits.

(18) Another DFS worker testified regarding threatening letters that Father had sent to DFS workers in 2019 and 2020. She also testified that she had reviewed a prison call log that reflected that Father had placed several calls to Mother's phone number in violation of the no-contact order. Mother similarly testified that Father had contacted her in violation of the no-contact order but asserted that he had "come a long way" and had stopped writing offensive and threatening letters to her in 2020.

(19) The court also heard testimony from DFS workers and a court-appointed special advocate that the Child was not bonded to Father and Mother and was well bonded to her foster family and thriving in their household, where she felt safe and loved. The foster family was attentive to the Child's physical, mental, and emotional needs; engaged her in various community activities; and encouraged her relationship with the extended foster family, Mother, and the maternal grandparents.

(20) Father's counsel called Father as a witness. Before he testified, the Family Court engaged in a colloquy with him, designed to ensure that he was aware that he was not required to testify and that if he did his testimony could be used against him in the pending criminal matters against him. Father stated that he understood and that he wanted to testify.

(21) Father asserted that he had completed the domestic-violence-prevention and anger-management elements of his case plan. He claimed that he had completed all programs available to him as a pretrial detainee and that his pretrial detention, rather than his own conduct, was the cause of his failure to complete his case plan. Father claimed that he satisfied the anger-management element of his case plan by completing the "6 for 1" program in May of 2019. When the Child's attorney asked Father about the offensive and threatening letters that Father had sent to DFS and his attorneys, Father testified that he did not believe that they represented his acting out in anger. He claimed that he was justified in threatening the life of his former attorney and stated that if a similar situation arose in the future he would respond the same. He also warned the Child's attorney that he should "watch [his] tone."

(22) On March 3, 2022, the Family Court entered an order staying its TPR decision until after Father's criminal trial, which was scheduled for May 9, 2022. In May 2022, a Superior Court jury found Father guilty of stalking, act of intimidation, and multiple charges of breach of release. On June 13, 2022, the Family Court issued its decision terminating Father's and Mother's parental rights. The court found that DFS had established, by clear and convincing evidence, statutory grounds for termination under 13 *Del. C.* § 1103(a)(5). Specifically, the court found that the Child had been in DFS's custody for approximately thirty-five months and that

Father (i) had failed to plan adequately for the Child's physical needs or mental and emotional health and development,[3] and (ii) was "incapable of discharging parental responsibilities due to extended or repeated incarceration."[4]

(23) Considering Father's case plan and the evidence presented, the court found that Father had not satisfied any of the elements of his case plan. The court found that Father had threatened Mother, a DFS worker, his court-appointed counsel, and the Child's attorney, demonstrating that he had not satisfied the elements of his case plan requiring him to "refrain from engaging in any form of criminal behaviors including making any verbal threats," develop "coping skills [to] help [him] create safety for the child," or engage in "a relationship that is not characterized by domestic violence." The court found that, although Father had participated in some mental-health treatment, the treatment was insufficient to ensure that Father could provide a safe environment for the Child, as evidenced by his prison disciplinary history, assault on a correctional officer, and his contact with Mother in violation of the PFA order. The court also found that Father had not satisfied the substance-abuse element of his case plan; had not completed parenting classes; and had not

[3] *See* 13 *Del. C.* § 1103(a)(5)a (providing for termination of parental rights if termination is in the child's best interest, the parent "is not able or has failed to plan adequately for the child's physical needs or mental and emotional health and development," and the child has been in DFS's custody for at least one year).

[4] *Id.* § 1103(a)(5)e. In addition to his criminal convictions in Family Court in 2021 and in Superior Court in 2022, for all of which he was awaiting sentencing at the time of the Family Court's TPR decision, the court also noted his extensive criminal history between 1991 and 2018.

completed a domestic-violence-prevention course or demonstrated his ability to avoid domestic violence. Among other things, the court observed that Father's discharge report from the "6 for 1" program reflected that Father had reported a long history of substance abuse since he was five years old and that he had "made progress on displaying ability to control his emotions" but had only begun to "explore his triggers and high-risk situations" and "struggled to accept responsibility for some of his past negative behaviors, choosing to believe the behaviors were beneficial in helping others change." The court further observed that the discharge report noted that Father's progress was "fair" and that he would "benefit from ongoing substance abuse and anger management treatment."

(24) The court further found that Father could not provide housing for the Child. The court rejected Father's contention that he was not to blame for his failure to complete his case plan because of his pretrial detention, concluding instead that he was detained because of his own conduct. The court further observed that, by the time of its decision, Father had been convicted of numerous criminal offenses and that, although he had not yet been sentenced for those offenses, the sentence would likely encompass the three years that he had already been detained plus several additional years. Finally, applying the factors set forth in 13 *Del. C.* § 722(a), the court determined that it was in the Child's best interests to terminate Father's parental rights. Father has appealed to this Court.

(25) This Court's review of the Family Court's decision to terminate parental rights entails consideration of the facts and the law as well as the inferences and deductions made by the Family Court.[5] We review legal rulings *de novo*.[6] We conduct a limited review of the trial court's factual findings to ensure that they are sufficiently supported by the record and are not clearly erroneous.[7] If the trial court has correctly applied the law, then our standard of review is abuse of discretion.[8] On issues of witness credibility, we will not substitute our judgment for that of the trier of fact.[9]

(26) The Delaware statute governing the termination of parental rights requires a two-step analysis.[10] First, there must be proof of a statutory basis for termination.[11] Second, if the Family Court finds a statutory basis for termination of parental rights, the court must determine that severing parental rights is in the child's best interest.[12] Both requirements must be established by clear and convincing evidence.[13]

---

[5] *Wilson v. Div. of Fam. Servs.*, 988 A.2d 435, 439-40 (Del. 2010).
[6] *Id.* at 440.
[7] *Id.*
[8] *Id.*
[9] *Wife (J.F.V.) v. Husband (O.W.V., Jr.*), 402 A.2d 1202, 1204 (Del. 1979).
[10] *See* 13 *Del. C.* § 1103 (listing grounds for termination of parental rights); *Shepherd v. Clemens*, 752 A.2d 533, 536-37 (Del. 2000) ("In Delaware, the statutory standard for terminating parental rights provides for two separate inquiries.").
[11] *Shepherd*, 752 A.2d at 537.
[12] *Id.*
[13] *Powell v. Dep't of Servs. for Children, Youth & Their Families*, 963 A.2d 724, 731 (Del. 2008).

(27) Father did not submit points to his counsel as permitted by Rule 26.1(c). Because of concerns regarding whether Father was receiving correspondence from counsel, on December 22, 2022, the Senior Court Clerk sent a letter to Father directing him to submit to the Court, by January 23, 2023, any points that he wanted the Court to consider. On January 13, 2023, Father requested additional time, and the Clerk directed Father to submit any points that he wanted the Court to consider by February 6, 2023. On February 16, 2023, Father filed a "Motion for Remand for Appointment of Counsel" in which he asserts that the Family Court violated his Due Process rights by not appointing new counsel to represent him after allowing his court-appointed counsel to withdraw; his testimony in this case violated his Fifth Amendment protection against self-incrimination; and the Family Court erroneously considered the potential length of his criminal sentences, when he had not yet been sentenced.

(28) After careful review of the record, we find no reversible error. First, the Family Court appointed three different attorneys to represent Father, because Father's offensive and threatening conduct toward the first two attorneys resulted in the Family Court's permitting them to withdraw.[14] Thus, his claim that the Family

[14] *Cf. Sackman v. Seaburn*, 2020 WL 1061690, at *2 (Del. Mar. 4, 2020) (holding that Family Court did not abuse its discretion by determining that father "forfeited any right to counsel he may have had" in a guardianship proceeding by his "extremely serious misconduct," including his "angry reactions to counsel's advice, acting in a loud and aggressive manner, using profanity, claiming that counsel was a racist, accusing her of conspiring with opposing counsel, making reference to his own violent criminal history in a manner that was intended to intimidate counsel,

Court erred by failing to appoint counsel to represent him is not supported by the record.[15] Second, "[u]nder the Fifth Amendment, an individual has the right to refuse to answer 'official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"[16] But that right was not violated here, because Father, who was represented by counsel, chose to testify after the Family Court informed him, on the record, that his answers could be used against him in his criminal proceedings and that he was not obligated to testify.[17] Third, the Family Court acknowledged that the sentences that would be imposed for the criminal convictions were not yet known but appropriately considered Delaware law and sentencing guidelines when determining the potential time of incarceration to which he was subject. In any event, at the time of the Family Court's decision, the Child had been in foster care for three years, during which time Father had been unable to establish a relationship with her or to provide for her physical or mental and emotional needs. The Family

---

and making an angry and inappropriate reference to counsel's husband"); *Bultron v. State*, 897 A.2d 758, 763-65 (Del. 2006) (discussing case law holding that a criminal defendant may forfeit his Sixth Amendment right to counsel by engaging in egregious behavior).

[15] Because Father had and has court-appointed counsel, his request that the Court remand for the appointment of counsel also is without merit and is denied.

[16] *Sierra v. Dep't of Servs. for Children, Youth & Their Families*, 238 A.3d 142, 158 (Del. 2020) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

[17] Transcript of Termination of Parental Rights Hearing at 246:23-247:13 (Del. Fam. Ct. Feb. 7, 2022). *Cf. Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (describing procedural protections for custodial interrogations that include a warning that the person "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

Court did not err by considering Father's potential criminal sentence in the circumstances of this case. We find no error in the Family Court's application of the law to the facts and are satisfied that Father's counsel made a conscientious effort to examine the record and the law and properly determined that Father could not raise a meritorious claim on appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED. Counsel's motion to withdraw is moot. The appellant's motion for remand for appointment of counsel is denied.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice